

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 033839-96

Paul Franklin
Banner Truck Leasing Company
Travelers Insurance Company

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Levine, Carroll¹ and McCarthy)

APPEARANCES

Donald J. Bertrand, Esq., for the employee at hearing
Paul Chomko, Esq., for the employee on appeal
Thomas F. Grady, Esq., for the employer
Frances D. O'Toole, Esq., for the insurer

LEVINE, J. The employee, the employer and the insurer all appeal from a decision in which an administrative judge denied the employee's claim for the reason that the claim was barred by a previous lump sum agreement. (Dec. 515.) The judge also denied the insurer's claim for penalties under § 14 of the act and awarded the employee attorney's fees. *Id.* We reverse the decision and recommit the case to the administrative judge for a hearing de novo.

Paul Franklin, the employee, was fifty-eight years old at the time of the decision. On September 5, 1996, while in the course of his employment with Banner Truck Leasing Company (hereinafter "Banner"), Mr. Franklin fell off a ladder and sustained an orthopedic injury. (Dec. 511.) A worker's compensation claim was filed and ultimately resulted in a lump sum settlement agreement which was approved on April 23, 1998. (Dec. 511-512; Exhibit 1.)

Subsequent to approval of the agreement, the employee filed a claim for § 34 benefits due to chronic lung disease. (Dec. 510.) The employee claimed

¹ Judge Carroll recused herself from participating in this case.

September 5, 1996, the last date of employment with Banner, as his injury date for purposes of the lung disease claim. (Dec. 512.) Additionally, the employee alleged serious and willful misconduct by the employer Banner and sought double compensation pursuant to § 28. (Dec. 510-511.) The claim was denied at conference and the employee appealed to a hearing de novo. (Dec. 511.) Prior to hearing, the insurer moved to deny and dismiss the employee's claim on the basis that it was barred by the lump sum settlement agreement. The insurer also alleged fraud by the employee, and it sought penalties under § 14(2) of the act. Id.

Since allowance of the insurer's aforesaid motion would preclude the employee's entire claim, the judge, without objection, bifurcated the proceeding for the purpose of first ruling on the insurer's motion. To that end, the parties submitted memoranda and presented oral argument to the judge. There was no testimony. Id. Following the hearing, the judge issued a decision granting the insurer's motion and dismissing the employee's claims. (Dec. 515.) He also denied the insurer's § 14 claim and awarded the employee attorney's fees. Id.

The employee first argues that the judge never should have considered the insurer's motion because the insurer did not raise the bar of the lump sum agreement when it initially denied the employee's present claim. We take judicial notice, and it is not disputed, that the "Insurer's Notification of Denial," does not raise the earlier lump sum settlement as a bar to the employee's claim. Section 7(1) of the act provides, inter alia, that if an insurer refuses to accept the employee's claim, the insurer

shall specify the grounds and factual basis for the refusal. . . . Any grounds and basis for noncompensability specified by the insurer shall, unless based upon newly discovered evidence, be the sole basis of the insurer's defense on the issue of compensability in any subsequent proceeding.

On the other hand,

an employee seeking to rely on § 7 as an avenue to prove his case, must raise the issue of noncompliance with § 7 at the conference held under § 10A and again at the hearing under § 11. Failure to

place § 7 in issue causes a claimant to forfeit a powerful ally as he seeks to carry his burden of proving each and every element of his case.

Taylor v. Brockton Hosp., 2 Mass. Workers' Comp. Rep. 304, 310 (1988). The employee first raised his objection to the propriety of the insurer's lump sum bar argument in his brief to this board. As a result, he is too late. Taylor, supra. The merits of the judge's action on the insurer's motion must be addressed.²

The judge's explanation for denying the employee's claim of a work-related respiratory condition, because of the prior lump sum agreement, is flawed. The judge appears to put undue emphasis on the date of the employee's orthopedic injury, September 5, 1996, which was the last day the employee worked, and which also became the assigned date of injury for the respiratory claim. The judge states: "The express language of the agreement states that the payment of \$30,000.00 'is received in redemption of the liability for all weekly compensation payments now or in the future due me under the Workers' Compensation Act for all injuries received by Paul Franklin *on or about September 5, 1996* while in the employ of Banner Truck Leasing, Inc.'" (Dec. 512, emphasis added.) "[S]ilence [in the lump sum agreement] on the issue of the employee's respiratory condition on or about September 5, 1996, is acceptance of its inclusion as part of the lump sum agreement." (Dec. 514.)

The judge's reliance on the language he quotes from the agreement is misplaced. The judge ignores other language of the lump sum agreement, including that the employee's diagnosis is "cervical & lumbar sprain," that on September 5, 1996, "Mr. Franklin fell from a ladder landing on his back," and was "diagnosed with a cerebral concussion, headaches and cervical and lumbar sprain/strain." (Exhibit 1.) Moreover, the agreement sets out the diagnostic tests and treatment the employee received for those specific injuries. Id. Read as a

² As we did in Elisee v. City of Holyoke, 8 Mass. Workers' Comp. Rep. 114, 115 (1994), we treat the judge's decision on the motion as a decision under § 11C of the act and appropriate for our review.

whole, it is clear that the lump sum agreement intended to redeem liability only for the traumatic injuries caused by the fall from the ladder. The date of injury for these conditions was the last day of the employee's work. For the purpose of assigning a date of injury for the gradual emergence of the respiratory condition, the last day of work is the convenient date, and a matter of "conformity with DIA practice." (Dec. 515.)³ See L. Locke, *Workmen's Compensation* § 177, at 192 (2d ed. 1981)(date of injury can be the date the employee was laid off from work, even though injury was the cumulative effect of an insult to the body).

The cases the judge cites for support in fact do not support his ruling. In Sylvia v. Burger King Corp., 6 Mass. Workers' Comp. Rep. 272 (1992), the employee claimed § 36 benefits for a work-related shoulder injury that had been redeemed by a lump sum agreement. The reviewing board affirmed the administrative judge's dismissal of the claim. "[W]e cannot assume where the agreement is silent that it does not include § 36 benefits. In light of this uncertainty, we hold that § 36 benefits are redeemed by payment of an approved lump sum amount, unless those benefits have been specifically reserved by the parties in the settlement document." *Id.* at 274. In Sylvia the employee sought § 36 benefits for the injured shoulder, but the lump sum agreement had redeemed liability for that very same shoulder. In the present case, the lump sum agreement redeemed liability for Mr. Franklin's traumatic injuries suffered when he fell from the ladder; the agreement did not purport to redeem liability for any other injuries. The judge's reliance on Elisee v. City of Holyoke, 8 Mass. Workers' Comp. Rep. 114 (1994), is similarly misplaced. In that case the board addressed a lump sum agreement that specifically released the insurer from liability "as a result of injury

³ At the hearing on the insurer's motion, the judge stated that

the September 5, 1996 date of injury [for the respiratory claim] is not the date as an incident as was the fall from a ladder, but was given as the date based on an exposure theory as September 5th, 1996 being the last day at work. And thus, the claim is for the days, weeks, months and potentially years prior to September 5th.

(Tr. 4.)

or illness, known or unknown, arising out of and in the course of his employment for the City of Holyoke, including all injuries or illness prior to October of 1981.” Id. at 117. The agreement also stated that “Place and date of all injuries included: All injuries up to and including October 5, 1981,” the date of the employee's shoulder injury. Id. at 116. The present lump sum agreement contains no comparably broad language, and the board’s conclusion, that Elisee could not claim a back injury allegedly related to his employment prior to the October 5, 1981 shoulder injury, has no bearing on the present case.

General Laws c. 152, § 48(4), added in 1991, provides that a perfected lump sum agreement “shall not affect any other action or proceeding arising out of a separate and distinct injury under this chapter, whether the injury precedes or arises subsequent to the date of settlement, and whether or not the same insurer is claimed to be liable for such separate and distinct injury.” “The language of this amendment is unambiguous, and we must therefore follow the ordinary meaning of the words.” Kszepka’s Case, 408 Mass. 843, 846 (1990)(interpreting a similar provision first appearing in the 1977 version of the statute and now appearing as subsection 5 of § 48). See L. Locke, *Workmen’s Compensation* §11.4 (Koziol Supp. 2000). This language “eliminated the possibility . . . of preventing employees from recovering for one injury when they have settled by a lump-sum agreement a separate and distinct injury.” Kszepka’s Case, supra at 847. But cf. Elisee, supra, where the agreement clearly intended to preclude other claims. In the present case, there is no reason to dismiss the employee's claim of a work-related respiratory condition on the basis of the prior lump sum agreement. Therefore, the case must be recommitted for hearing on the merits of the employee's claim.⁴

⁴ The lump sum agreement here allocated the net amount of the award the employee received over the employee's work life expectancy and yielded a weekly rate of \$34.98. Should the employee succeed on his claim of a work-related respiratory condition, any weekly benefits should be offset by that amount to avoid double recovery. Cf. Kszepka’s Case, supra at 848-849 (since the lump sum did not make allocations for weekly benefits, it was impossible to determine that there would be double recovery).

In his decision, the administrative judge rejected the insurer's allegation that the employee committed fraud under § 14(2) by pursuing the respiratory claim. (Dec. 514-515.) The judge found that the employee had grounds to contend that the lump sum agreement did not preclude the respiratory claim. (Dec. 515.) Because the judge denied the insurer's claim of fraud, he ruled that the employee prevailed on the issue, and he awarded an attorney's fee. Id.

We agree with the insurer that it was premature to have acted on the § 14(2) claim. No testimony was ever taken to test the employee's intent and reasonableness.⁵ The only proceeding was a non-testimonial hearing on the insurer's motion to dismiss based on the lump sum agreement.⁶ Since it was error to have acted on the § 14(2) claim, it was error to have awarded an attorney's fee to the employee. We reverse the decision denying the § 14 claim and awarding attorney's fees. But cf. Talbot v. Stanton Tool & Mfg., Inc., 11 Mass. Workers' Comp. Rep. 528, 529 (1997)(employee's successful defense against an insurer's claim of fraud warrants an award of an attorney's fee). Upon recommittal, the insurer's and employer's various § 14 claims can be litigated.

For the reasons given, we reverse and recommit the case for hearing (1) on the merits of the employee's claim for benefits arising out of an alleged respiratory condition causally related to his employment; (2) on his claim for § 28 penalties; and (3) on the insurer's and employer's claims for § 14 penalties.

So ordered.

⁵ It appears that the employer and/or insurer, in addition to seeking penalties under § 14(2)(fraud), also sought penalties under § 14(1)(claim brought without reasonable grounds). See the Temporary Conference Memorandum Cover Sheet.

⁶ There is some suggestion that the fraud allegation arises solely from the employee's bringing the respiratory claim when he knew (according to the insurer) that it was precluded by the lump sum agreement. (Tr. 4, 5.) But there is also a suggestion that there may be other aspects to the fraud allegation. (Tr. 30.)

Paul Franklin
Board No. 033839-96

Frederick E. Levine
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

FEL/kai:
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